82-872

No.

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

WILLIAM JOSEPH LEGNER,
Petitioner,

VS.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK C. ROESTI
COUNSEL OF RECORD
929 Clayton Street
San Francisco, CA 94117
Telephone (415) 564-1650
Attorney for Petitioner
William J. Legner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does the statutory right to jury trial under the Age Discrimination in Employment Act provide for resolution of conflicting evidence and inferences by the jury as trier of fact, including factual disputes over the qualifications of an older employee for available positions and disputed evidence of pretext and if so, what is the appropriate standard of review on defendant's motion for di ected verdict after plaintiff's case in chief?

2. Does the Age Discrimination in Employment Act apply to positions that become available shortly after the termination of an older employee, where the availability of such positions was within the knowledge or reasonable expectation of the employer at the time of termination, but not disclosed or made available to the older employee?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	2
Provisions of law involved	2
Statement of case	2
(a) Factual background	2
(b) The district court decision	8
(c) Ninth Circuit Court of Appeals decision	9
Reasons for granting writ	10
I	
The court of appeals decision is in direct conflict with the standing decisions of other circuit courts of appeals and represents a substantial departure from judicial procedures under the Age Discrimination in Employment Act	10
II	
The opinion of the court of appeals excluding consideration of positions available after the termination of Legner, that were within the knowledge or reasonable expectation of the railroad at the time of termination, raises an important question regarding the scope of the ADEA and is in direct conflict with standing decisions of other courts of appeals	19
Conclusion	23

TABLE OF AUTHORITIES CITED

Cases

Page

Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976) 13

Bertrand v. Orkin Exterminating Co., 454 F.S. 78 (N.D. Ill., 1978) 22

Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (5th Cir. 1980) 22

Coates v. National Cash Register, 433 F.S. 655 (W.D. Vir. 1977) 22

Connelly v. Joseph Schlitz Brewing Co., 600 F.2d 461 (5th Cir. 1979) 12, 17

East v. Romine, Inc., 518 F.2d 332, 338 (5th Cir. 1979) 20, 21

Furnco Construction Company v. Waters, 438 U.S. 567, 577-579, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) 16, 17

Goodman v. Heublein, Inc., 645 F.2d 127, 129 (2nd Cir. 1981) 13, 17

Hedrick v. Hercules, 658 F.2d 1088 (5th Cir. 1981) 12

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L. Ed. 2d 396 (1977) 16

Jacobs v. Martin Sweet Co., Inc., 550 F.2d 364, (6th Cir. 1978) 22

Laugesen v. Anaconda Corporation, 510 F.2d 307, (6th Cir. 1975) 12, 16

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 14, 16, 17, 20

Lorillard v. Pons, 434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) 11

McClelan v. Philips-Ramsey, Inc., 624 F.2d 70 (9th Cir. 1980) 20, 21

Table of Authorities Cited

Cases

Page

McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980) 13, 17, 20

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 16, 17, 20

Marshall v. Airpax Electronics, Inc., 595 F.2d 1043, 1044, (5th Cir. 1979) 20

Marshall v. Roberts Dairy Co., 572 F.2d 1271 (8th Cir., 1978) 17

Obrien v. Sky Chef Inc., 670 F.2d 864 (9th Cir. 1982) 13

Rodriguez v. Taylor, 569 F.2d 1231, (3rd Cir. 1977) 13

Rosada v. Santiago 562 F.2d 114, 119 (1st Cir., 1979) 22

Smith v. Farah Manufacturing Co., Inc., 650 F.2d 64, 68 (5th Cir. 1981) 15

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed.2d 207, (1981) 16

Wilson v. Sealtest Food Division of Kraftco Co., 501 F.2d 84 (5th Cir. 1974) 13, 17

Table of Authorities Cited

Statutes

	Page
28 U.S.C., Section 1254(1)	2
29 U.S.C.:	
Section 211(b)	13
Section 216(b)(2)	13
Section 217	13
Section 621-1	2, 19
Section 621-2	19
Section 621(a)	10
Section 621(b)	10
Section 621 et seq.	2, 8
Section 623	10
Section 623(a)	2
Section 623(a)(1)	19
Section 623(a)(2)	19
Section 626(c)(1)	2
Section 626(c)(2)	2, 11
Section 631(a)	2
42 U.S.C. Section 2000e et seq.	10

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

WILLIAM JOSEPH LEGNER,
Petitioner,

VS.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William Legner respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit in Legner v. Union Pacific Railroad Company, ... F.2d ....., filed on May 26, 1982.

OPINIONS BELOW

The Opinion of the Court of Appeals is set forth in Appendix A to the Petition. The Court of Appeals' Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is set forth in Appendix B to the Petition. The Judgment of the United States District Court for the Northern District of California, filed October 16, 1980, is set forth in Appendix C and the Findings of Fact and Conclusions of Law of the District Court, filed October 16, 1980, are set forth in Appendix D. The Order of the District

Court Denying Plaintiff's Motions for New trial and to Amend Findings of Fact and Conclusions of Law, filed December 3, 1980, is set forth in Appendix E. The Oral Rulings of the District Court in favor of Defendant's Motion for Directed Verdict, February 5 and 6, 1980 appear as Appendix F and Appendix G, respectively.

JURISDICTION

The Judgment of the Court of Appeals was filed on May 26, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 31, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case was brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et sequitur*. The pertinent sections, 29 U.S.C. § 621; 29 U.S.C. § 623(a); 29 U.S.C. § 626(c)(1) and (2) and 29 U.S.C. § 631(a) are set forth in Appendix H to this petition.

STATEMENT OF CASE

(a) Factual Background

Respondent Union Pacific Railroad Company ("Railroad") is a large company that employs over 29,000 employees in nine major departments. Petitioner William Legner was employed in the Railroad's Traffic Department as Assistant Chief Clerk to Traffic Manager Olsen in the San Francisco Northern California Region Office. Among his duties, Legner was responsible for the accounting and bill collection duties for the Region Office, resolution of customer inquiries, and liaison functions between the Railroad's customers and other railroad agencies.

Legner trained a part-time subordinate employee, Borrowman, age 30, as his assistant and supervised Borrowman in the performance of those duties. In April, 1976, Legner was informed that his position and the clerk stenographer position held by Borrowman were going to be abolished when the Railroad installed a centralized lock box accounting system. The lock box system was eventually installed on July 23, 1976. Legner was terminated on July 1, 1976. Borrowman was retained to perform Legner's duties until July 23, 1976 and then reassigned to the position of Clerk in the Manifest Department, effective August 1, 1976.

Legner brought this action in a timely manner, alleging specific acts of age discrimination, including: (a) failure to promote Legner to available Management Training Program positions in May, 1976; (b) failure to transfer Legner to an available Traffic Agent position in June, 1976; (c) the retention of Borrowman to perform Legner's duties and preference given to Borrowman over Legner's objection; (d) the failure to offer Legner a Chief Clerk to General Traffic Agent position available on or before July 23, 1976; and (e) the total exclusion of Legner from personnel planning regarding comparable positions and levels of employment within or outside the region.

Legner was 54 years old at the time of his termination and had a nineteen year service record. Legner began his employment as an entry level stenographer in 1957. In two weeks, Legner was promoted to accounting clerk. In 1958, Legner was promoted to Clerk-Stenographer to General Freight and Passenger Agent. In 1960, Legner was promoted to handle payroll and rate dockets under the Chief Clerk to Traffic Manager. In 1962, Legner was promoted to Ticket Agent; in 1965, to Assistant City Ticket Agent;

and in 1967, to City Ticket Agent. As City Ticket Agent, Legner was responsible for Passenger Department matters in the region, supervised several subordinate employees, consolidated freight and passenger accounts and received high commendations in his personnel file for the performance of his duties.

In May, 1970, the Passenger Department was abolished and Legner was transferred laterally to the position of Assistant Chief Clerk to Traffic Manager Olsen. Legner's immediate superior was Chief Clerk Hrebich. Traffic Manager Olsen was responsible for personnel planning in the San Francisco Northern California Region together with General Traffic Manager Shum located in Omaha, Nebraska. Shum maintained a personnel planning book for the entire Traffic Department in the United States and was knowledgeable of vacant positions in eastern and western United States.

Legner enjoyed the status of a junior management employee. Legner received annual salary increases and merit salary increases under the Railroad's Administration Salary Program, and received the management compensation benefit plan, equal to an added 31.5% over Legner's salary. Legner was annually evaluated by his immediate superior Hrebich and by Traffic Manager Olsen on the Railroad's Executive and Exempt Performance Appraisal Worksheet.[1]

In October-November, 1974, Olsen and Hrebich evaluated Legner and rated him "superior" in collection procedures

---

[1]The Railroad's Executive and Exempt Performance Appraisal Worksheet provides for performance appraisal ratings of "outstanding", "superior", "fully competent", "generally adequate", and "Marginal or no rating". It does not provide for any numerical ratings. Plaintiff's Exhibits 4 and 14, Excerpts of Clerk's Record, pages 49 and 55.

and "fully competent" in all other areas. Olsen and Hrebich described Legner as "very effective" at securing any information he lacked, with "complete knowledge" of his position, and that Legner would best utilize his training, background and personal characteristics in either the position of "Chief Clerk to Traffic Manager" or "Traffic Agent." Olsen and Hrebich recommended that Legner was "ready for promotion" to either position of "Chief Clerk to Traffic Manager" or "Traffic Agent," without any reservations.

The next and last evaluation of Legner was in December 1975-January 1976. Olsen and Hrebich rated Legner "superior" in collection procedures and "fully competent" in all other areas. They described Legner as "fully developed" in the position of Assistant Chief Clerk to Traffic Manager and recommended that Legner was "ready for promotion" to "Chief Clerk to Traffic Manager" without any reservations.

The stated Railroad policy was to transfer employees to lateral positions within their region or outside their region in the event a position was abolished. On April 28, 1976, Legner was informed that his position and the position of Borrowman would be abolished with the eventual installation of the lock box system. Hrebich promised Legner that he would be given preference over Borrowman.

On April 28, 1976, Traffic Manager Olsen also met with Legner. Olsen asked Legner if he would accept the position of Chief Clerk to General Traffic Agent in Reno, Nevada. Legner replied that he would accept the Chief Clerk to General Traffic Agent position in Reno, Nevada. Legner attached no limitations. Following this meeting, Olsen never discussed the position of Chief Clerk to Gen-

eral Traffic Agent in Reno with Legner again and never offered it to him. Instead, the position of Chief Clerk to Traffic Agent in Reno was filled by Olsen and Shum with the promotion of manifest clerk Smith, age 26, from a subordinate level position, on July 23, 1976, effective August 1, 1976.

During the period from April 28, 1976 through July 23, 1976, Olsen and Shum actively engaged in long range personnel planning, involving the management training program and positions of Traffic Agent in Oakland, California and in Los Angeles; Chief Clerk to General Traffic Agent in Reno, Nevada, and in Stockton, California; and Clerk positions in the Manifest and Intermodal Departments in San Francisco. Legner was excluded from consideration for these positions. No attempt was made to transfer Legner to any lateral position within the region or outside the region as per stated Railroad policy.

In May, 1976, Traffic Manager Olsen privately recruited and selected a younger employee, Melton, age 30, from the entry level position of clerk-stenographer to the Railroad's management training program. The Railroad did not advertise or publicize the availability of these positions. Notwithstanding his annual evaluations, Legner was neither informed nor considered for this position. At trial, Legner introduced statistical evidence that during the six and one half year period from January 1, 1970 to July 1, 1976, although employees over the age of 40, including Legner, represented sixty percent of the Traffic Department employees, *all* of the eighteen management training program positions were filled by the private recruitment and selection of Traffic Department employees under the age of forty.

On June 24, 1976, Legner was next informed by letter that his position would be abolished at the close of the business day, June 30, 1976, and that his duties were being transferred to Borrowman, although no date was given for the installation of the lock box system. The letter also asked Legner to accept or decline an entry level position of clerk-stenographer. This position represented a demotion, loss of junior management status, loss of the substantial management compensation benefit and retirement plan, and relegation to the performance of receptionist and typing duties in an entry level position.

Following receipt of this letter, Legner learned of an available Traffic Agent position in Oakland, California. Legner met with Traffic Manager Olsen and requested transfer to the Traffic Agent position. Olsen denied Legner's request without explanation. Legner then requested that Olsen retain Legner rather than Borrowman to perform Legner's duties until the lock box system was installed. Olsen refused this request. The Traffic Agent position was subsequently filled by promotion of a 27 year old employee, Mietz, from the subordinate position of rate clerk.

On July 1, 1976, Legner was terminated when he declined to accept the clerk-stenographer position and his above requests were denied. Legner testified he knew from experience that other positions suitable to his ability and level of employment would be available if he was retained instead of Borrowman to perform his duties. Chief Clerk to Traffic Manager Olsen, Hrebich, also testified from his experience and knowledge, that other positions suitable to Legner's ability and level of employment would be avail-

able to Legner if Legner was retained instead of Borrowman to perform his duties.

Traffic Manager Olsen and General Traffic Manager Shum had even greater knowledge. They were actively engaged in personnel planning at the time, resulting in wide-ranging decisions on July 23, 1976, involving the positions of Chief Clerk to General Traffic Agent in Reno, Nevada, and in Stockton, California; Traffic Agent in Los Angeles and Clerk in the Manifest Department and Intermodal Department in San Francisco, among others.

Borrowman continued to perform Legner's duties until July 23, 1976 when the lock box installation was completed. Borrowman was then retained without specified duties until assigned to the position of Clerk in the Intermodal Department, effective August 1, 1976.

(b) The District Court Decision

In the District Court, Legner's allegations of age discrimination were tried before a jury as trier of fact pursuant to the expressed jury trial provisions of the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et sequitur*. Following the presentation of Legner's case in chief, the Railroad made an oral motion for directed verdict. Ruling from the Bench, the District Court granted directed verdict in favor of defendant and removed any and all questions of fact from the jury.

The District Court ruled that the abolishment of Legner's position was for sound business reasons, that Legner was offered and rejected reasonably comparable alternative employment, and that there was no available position for which Legner was qualified at the time of his termination

(Appendix F and Appendix G). The District Court decision did not reach the specific allegation of age discrimination regarding available positions in the management training program or as Traffic Agent *prior* to the termination of Legner nor the preferential treatment of Borrowman before, at, and after the termination of Legner and did not consider the personnel decisions regarding the positions available after the termination of Legner, whose availability was known or within the reasonable expectation of the Railroad, Shum, Olsen, and Hrebich, at the time of the termination of Legner.

(c) Ninth Circuit Court of Appeals Decision

The Ninth Circuit Court of Appeals affirmed the Judgment entered below. Addressing the specific allegations of age discrimination before it, the Ninth Circuit held that it was inappropriate to consider the positions available after termination if the clerk-stenographer position offered to and declined by Legner were the only available position to which Legner merited transfer at the time of termination. Applying a narrow "replacement" test to the transfer of "some" of Legner's tasks to Borrowman during the phase out period, the Court of Appeals found neither a replacement nor a discriminatory replacement of Legner by Borrowman. Limited to "replacement," the Court of Appeals opinion does not address the issue of the preferential treatment of Borrowman over Legner before, upon and after the termination of Legner.

Upholding the directed verdict in favor of the Railroad, the Court of Appeals' opinion rests upon a factual determination that Legner was not "qualified" for promotion to the management training program and Traffic Agent position on the basis of his numerical employee rating, and

that even if the evidence of Legner's qualifications were sufficient to establish a prima facie case of age discrimination, the Railroad had a legitimate, nondiscriminatory motive that prevented a jury from finding that age discrimination was a determining factor in the Railroad's actions. The Ninth Circuit decision does not address the exclusion of Legner from positions available after the termination of Legner any further, nor does it purport to consider the importance of the right to trial by jury on the issue before it under the ADEA.

REASONS FOR GRANTING WRIT

I

THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THE STANDING DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND REPRESENTS A SUBSTANTIAL DEPARTURE FROM JUDICIAL PROCEDURES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act was enacted to promote the employment of older employees and to protect individual employees from discrimination based on age, 29 U.S.C. § 621 (a) and (b). The statutory prohibitions against age discrimination extend to all terms, conditions and privileges of employment and that would limit, segregate or classify older employees in a way that would *"deprive or tend to deprive"* older employees of employment opportunities or adversely affect employment status because of age, 29 U.S.C. § 623.

Unlike the enforcement provisions against race and sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et sequitur*, this Court has recognized

the right to jury trial in age discrimination cases under the ADEA in *Lorillard v. Pons,* 434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). Subsequently, Congress amended the ADEA to expressly provide that an aggrieved person "shall be entitled to a trial by jury of *any issue of fact* in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action," 29 U.S.C. 626 (c) (2), emphasis added.

Contrary to this statutory entitlement to a trial by jury of disputed facts and inferences therefrom, the Court of Appeals' opinion affirmed the removal of factual issues regarding the "management training program" and "Traffic Agent" positions, discussed above, from the jury on defendant's motion for directed verdict after plaintiff's case in chief, finding:

> Legner was not promoted to the management training program or to the Traffic Agent position because he was unqualified. The uncontested evidence introduced by Legner was that those promotions only went to employees rated "1" or "2," and Legner had an overall rating of "3." Though one of Legner's evaluations indicated that he was ready for promotion to Traffic Agent, though one management employee of the Railroad stated that Legner was qualified *no other people* he might promote, and though Legner did introduce some statistical data, these were at most sufficient merely to establish a prima facie case, and we cannot state they were adequate even for that. Nevertheless, assuming this showing had been enough to maintain a prima facie case, the uncontradicted and overwhelming evidence that the Railroad had a legitimate, nondiscriminatory motive prevented a jury from finding that age discrimination was a determining factor in the

Railroad's actions. (Court of Appeals Opinion, Appendix A, page 4)

Resting entirely upon "judicial" findings of fact, the Court of Appeals' opinion is a substantial departure from the express statutory right to trial by jury of disputed issues of fact, including pretext and the ultimate issue of age discrimination, and stands in direct conflict with other Courts of Appeals. In *Hedrick v. Hercules,* 658 F.2d 1088 (5th Cir. 1981), the Fifth Circuit Court of Appeals found that similar evidence of qualification for available positions from remarks in annual evaluations and from other positions held was sufficient evidence to withstand a motion for directed verdict by defendant and raise a jury question. Unlike the decision below, the Fifth Circuit in *Hedrick* applied the traditional standard of review on defendant's motion for directed verdict, viewed *all* the evidence in the light most favorable to plaintiff, and followed the statutory mandate in age discrimination cases that the function of the jury, not the court, is to resolve evidence and inferences, and determine the credibility of witnesses. In *Connelly v. Joseph Schlitz Brewing Co.,* 600 F.2d 461 (5th Cir. 1979), the Fifth Circuit has also held that it is sufficient to present evidence the plaintiff was qualified "to do the job" and proffered explanations that factors other than age were the reason for adverse employment decisions against an older worker were questions for the jury to resolve, and not the court, on defendant's motion for direct.

In *Laugesen v. Anaconda Corporation,* 510 F.2d 307, 312 (6th Cir. 1975). The Sixth Circuit Court of Appeals has held that even equivocal evidence of qualifications for available positions was sufficient to raise a question of fact for the jury, not the court, to resolve in age discrimination

cases. In *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), evidence of a pattern of age discrimination in work reductions was sufficient to establish a reasonable inference of age discrimination for the jury to resolve as trier of fact, even where the employer proffered a legitimate, nondiscriminatory motive of "just cause" for discharge.

In *Rodriguez v. Taylor*, 569 F.2d 1231, 1238-40 (3rd Cir. 1977), the Third Circuit Court of Appeals held that evidence of general qualifications and capabilities required to perform the duties of a position in issue was sufficient to establish a prima facie case of age discrimination with sufficient quantum of evidence to withstand directed verdict for defendant in an action brought pursuant to the ADEA. In *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129 (2nd Cir. 1981), the Second Circuit Court of Appeals further observed that while the ADEA incorporated the enforcement remedies and procedures of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 211(b), § 216(b)-(2), and § 217, Congress expressly departed from the FLSA procedure under the ADEA by "committing the employer's state of mind to the trier of fact."[2]

In failing to submit to the jury the disputed evidence of qualifications and pretext for the failure to promote Legner to the positions of management training program and

---

[2]See also *Wilson v. Sealtest Food Division of Kraftco Co.*, 501 F.2d 84 (5th Cir. 1974), reversing directed verdict for defense after plaintiff's case in chief as premature; and *compare Abrams v. Johnson*, 534 F.2d 1226 (6th Cir. 1976), holding that under Title VII, evidence of qualifications, not proof of best qualified, was sufficient to establish a Title VII prima facie case of employment discrimination; and *Obrien v. Sky Chef Inc.*, 670 F.2d 864 (9th Cir. 1982), a more recent Title VII case, holding that where, as below, the quali-

Traffic Agent, that were available prior to the termination of Legner, the Court of Appeals abrogated the function of the jury as trier of fact in direct conflict with the standing decisions of the other Circuit Courts of Appeal discussed above. The Court of Appeal's opinion below also misstates and misrepresents the record itself.

The *only* explanation proffered by the Railroad for its failure to promote Legner to the management training program position available in May, 1976 or the Traffic Agent position available in June, 1976 was its "rating" explanation. (R.T. 119-126) The "rating" explanation was not "uncontested evidence introduced by Legner" (Court of Appeals Opinion, Appendix A, page 4). The proffered "rating" explanation was the testimony of Traffic Manager Olsen. Traffic Manager Olsen was an adverse witness. Olsen's proffered "rating" explanation at trial was in direct conflict with his written evaluations that Legner was "ready for promotion" to "Traffc Agent" or to "Chief Clerk to Traffic Manager," without any expressed reservations.

Traffic Manager Olsen further admitted at trial that Legner was qualified to perform the duties of the Traffic Agent position. The disclaimer by Olsen that Legner was qualified for the Traffic Agent position, *given no competition*, was in direct conflict with Olsen's written evaluations of Legner and with the record evidence comparing

---

fications for a position are *not* articulated, a pattern of exclusion creates a rebuttable presumption that each denial of promotion is discriminatory. *In contrast*, see *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit holding, as *dicta*, that normally plaintiff in age discrimination cases will know defendant's proffered explanations, and allocating the burden of presentation and persuasion of pretext to plaintiff on defense motion for directed verdict after plaintiff's case in chief.

Legner's qualifications for the available positions of management training program and Traffic Agent against the younger employees promoted to the respective positions in place of Legner.[5] The factual misstatements in the Court of Appeals opinion underscore the direct conflict with the Court of Appeals decisions in other Circuits and the sub-

---

[5]The management training program position was a logical next step in Legner's progression of promotions and merit increases. Legner had supervisory experience. Legner had nineteen years of service. Legner knew the Railroad. He had served as liaison between the Railroad's customers and other railroad agencies. He was entrusted with the Railroad's financial matters, received high commendations as City Ticket Agent, and had "superior" ratings in handling difficult collection matters and customers (R.T. 27-49; Plaintiff Exhibits 4 and 14). Melton, had none of these qualifications. Melton was promoted from an entry level position of clerk-stenographer with receptionist and typing duties and two years employment with the Railroad (R.T. 210-212).

The Traffic Agent position was primarily a sales position with customer contact. In addition to the written evaluations and admission by Traffic Manager Olsen, noted above, Legner had received high commendations in his personnel file for performance of sales duties as City Traffic Agent. Legner had extensive customer contacts. Legner knew many of the customers involved from his previous duties. Legner received "superior" ratings in handling difficult customer problems (R.T. 27-49, 105; Plaintiff Exhibits 4 and 14). Mietz had no sales experience and little or no customer contact. Mietz had five years employment with the Railroad and was promoted from the position of a rate clerk subordinate to Legner (R.T. 127-130; Plaintiff Exhibit 7).

Both Melton and Mietz were promoted from union level positions (R.T. 129-130, 210-212, 74). Neither Melton nor Mietz were rated on the Executive and Exempt Appraisal Performance Work Sheet (*ibid.*). No evidence was introduced by the Railroad of how Melton and Mietz were rated or of any annual evaluations of their work or what their job ratings were. See also *Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 68 (5th Cir. 1981), independent judgment as appropriate standard of review of factual findings on appeal.

stantial departure from jury trial of issues of fact in age discrimination cases.

In addition to the direct conflict with the standing decisions of other Circuits, this case also presents an appropriate opportunity for this Court to review the prima facie elements of age discrimination and bring uniformity to the Circuits Courts of Appeals regarding the appropriate standard of review of motions for directed verdict in age discrimination cases in the context of the statutory right to jury trial of "any issue of fact." Without such review, the various Circuits will continue to apply the Title VII formulation set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973) and its progeny,[4] either with varying and conflicting modifications to accommodate the right to jury trial or with no modification.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit expressly recognized that the subtleties of the *McDonnell Douglas* formulation made for confusion when applied to jury trials. In *Laugesen, supra* at 312, the Sixth Circuit Court of appeals observed that this Court in *McDonnell Douglas* did not attempt to deal with problems and procedures inherent in submission of factual issues to juries. This Court has not addressed that issue in subsequent decisions. Even while applying the *McDonnell Douglas* formulation with modifications to age discrimination in

---

[4] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L. Ed. 2d 396, (1977) *Furnco Construction Company v. Waters*, 438 U.S. 567, 577-579, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978); and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed 2d 207, (1981).

McCorstin, supra at 753, the Fifth Circuit Court of Appeals recognized that *McDonnell Douglas* was not the "alpha and omega" of possible tests of age discrimination and that while traditional standards of review of motions for directed verdict were a necessary component, they were not sufficient.

Other Circuits are in conflict about whether to allocate the burden of presenting evidence of pretext as part of the prima facie case to withstand a motion for directed verdict by defendant after plaintiff's case in chief or whether to leave the issue of pretext for the jury to decide in light of all the evidence presented, or to accommodate the right of plaintiff to present rebuttal evidence of pretext. *Compare*, for example, the First Circuit approach in *Loeb, supra* at 1016, pretext properly resolved by Court on defendant's motion for directed verdict, in contrast to the Fifth Circuit approach in *Wilson, supra* at 86 and *Connelly, supra* at 461, issue of pretext reserved for jury; and the Sixth Circuit approach in *McCorstin, supra* at 753, reasonable inferences of age discrimination raise question for jury. See also *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir., 1978), business reason pretext as jury question, and *Goodman, supra* at 129, employer's state of mind reserved for jury as trier of fact. Compare also this Court's *McDonnell Douglas* restatement in *Furnco, supra* at 578, describing the right of plaintiff to present rebuttal evidence of pretext in Title VII cases.

For these reasons, there is an express need for this Court to review the elements of a prima facie case of age discrimination in the context of the statutory right to jury under ADEA and on defense motion for directed verdict after plaintiff's case in chief. This case provides a particu-

larly meaningful opportunity for review by this Court with reference to (a) failure to promote Legner to the privately recruited management training program prior to termination, (b) failure to transfer Legner to the available Traffic Agent position prior to termination, (c) statistical exclusion of all older employees from the privately recruited management training program, (d) exclusion of Legner from regional personnel planning, (e) exclusion of Legner from stated Railroad relocation policies for displaced employees, (f) preferential treatment of and retention of Legner's younger subordinate Borrowman to perform Legner's duties over Legner's objections, and (g) failure to consider or inform Legner for positions available after the termination of Legner, which positions were known or within the reasonable expectation of the Railroad at the termination of Legner.

Certiorari should be granted to bring uniformity of review to the Circuit Courts of Appeals, to define the appropriate standard of review of a prima facie case of age discrimination on a defense motion for directed verdict in light of the statutory right to jury trial of "any issue of fact," and to redress the substantial departure from the right to a jury trial of disputed evidence and inferences of age discrimination in this case.

II

THE OPINION OF THE COURT OF APPEALS EXCLUDING CONSIDERATION OF POSITIONS AVAILABLE AFTER THE TERMINATION OF LEGNER, THAT WERE WITHIN THE KNOWLEDGE OR REASONABLE EXPECTATION OF THE RAILROAD AT THE TIME OF TERMINATION, RAISES AN IMPORTANT QUESTION REGARDING THE SCOPE OF THE ADEA AND IS IN DIRECT CONFLICT WITH STANDING DECISIONS OF OTHER COURTS OF APPEALS

There are no exceptions in the ADEA, excluding future employment opportunities from the prohibition against age discrimination, especially where the availability of such opportunities is within the knowledge or reasonable expectation of the employer. The provisions of the ADEA are specifically addressed to the problems of older workers to retain employment and "regain" positions when replaced 29 U.S.C. § 621. The scope of prohibited acts extends to any discrimination in terms or privileges of employment and to any limit, segregation, or classification of older employees that would "deprive or tend to deprive" them of employment opportunities or otherwise adversely affect their employment status. 29 U.S.C. § 623(a)(1) and (2).

Clearly to demote or terminate an older employee, over his objection, in order to segregate and limit, if not totally exclude, him from positions that will become available within the knowledge or reasonable expectation of the employer is within the scope of the ADEA, 29 U.S.C. § 623 (a) (1) and (2). To further deny an older employee's request to be retained, instead of a younger subordinate employee, to perform his duties until such positions become

available creates a further inference of age discrimination, especially where the younger subordinate employee was so retained until a suitable position was available. The scope of the express statutory provisions addressed to problems of older employees to "regain" positions and to any limit, segregation or classification that would "deprive or tend to deprive any individual of employment opportunities" because of age could not be more clear.

The Court of Appeals' opinion below is in conflict with standing decisions of other Courts of Appeals. In *Loeb, supra* the First Circuit Court of Appeals reviewed employment opportunities five months after an employee's termination in determining the contour of a prima facie case of age discrimination under the ADEA. In *McCorstin, supra* at 751, the Fifth Circuit Court of Appeals examined relevant evidence of post-termination conduct by the employer as relevant to the issue of whether the employer's proffered explanation was pretext. In *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043, 1044, (5th Cir. 1979), the Fifth Circuit also approved the right to review available subsequent positions raised by plaintiff in the complaint.

Even under the aegis of Title VII proscriptions, the Courts of Appeals have not limited review arbitrarily. In *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1979), the Fifth Circuit Court of Appeals reviewed employment applications within a six month period following the rejection of an application for employment. In *McClelan v. Philips-Ramsey, Inc.*, 624 F.2d 70 (9th Cir. 1980), the Ninth Circuit Court of Appeals itself ruled that the *McDonnell Douglas* formulation of employment discrimination was not limited to the time of application for employment but extended to employment opportunities that became available within a one month period. Legner's request to retain

his duties instead of Borrowman until the lock box system was installed so that he would be available for suitable positions was no less a request than the request for employment in *East, supra* or *McClelan, supra.*

The holding of the Court of Appeals below, that it would be inappropriate to consider later positions after his termination if Legner declined the clerk stenographer position and it was the only available job to which he merited a transfer during the period before and at the time of his termination (Opinion, Appendix A, page 2) raises a further important question regarding the scope of the ADEA prohibitions and central role of the jury as trier of fact. As well illustrated in this case, unless positions available after termination are considered, a jury is deprived of all the relevant evidence to determine whether the employer was actively engaging in conduct to segregate out older employees by demotion to entry level positions or termination in order to deprive them of future employment opportunities within the knowledge or reasonable expectation of the employer.

Unless such positions available after termination are considered, the jury as trier of fact under the ADEA is deprived of relevant evidence in determining whether the retention of a younger subordinate employee to perform the duties of an older employee, even for three weeks, was part of a plan of preferential treatment of the younger subordinate employee over the older employee to provide such employment opportunities to him in violation of ADEA. Unless such positions available after termination, like the Chief Clerk to General Traffic Agent position in Reno on July 23, 1976 during the period of time that Borrowman continued to perform Legner's duties, are considered, the jury as trier of fact would be deprived of

relevant evidence in determining whether the offer to and withdrawal of such position from an older employee, and his exclusion from employer personnel planning was part of a "youth movement," arbitrarily discriminating against him on the basis of age.

The Court of Appeals' opinion below further conflicts with the decision of the Fifth Circuit Court of Appeals in *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980) and the Sixth Circuit Court of Appeals in *Jacobs v. Martin Sweet Co., Inc.*, 550 F.2d 364, 367-370 (6th Cir. 1978). Decided under the aegis of Title VII, *Bourque* and *Jacobs* hold in similar situations that such an offer or demotion, in itself, may amount to a constructive discharge. See also *Rosado v. Santiago*, 562 F.2d 114, 119 (1st Cir., 1979), onerous transfer forcing employee to quit as constructive discharge. In *Bertrand v. Orkin Exterminating Co.*, 454 F.S. 78 (N.D. Ill., 1978), the District Court held that removal itself may be a violation of the ADEA if the jury found it was motivated by age discrimination. See also *Coates v. National Cash Register*, 433 F.S. 655 (W.D. Vir. 1977), rejection of alternative position may mitigate damages under the ADEA if the jury finds it to be comparable; it does not eliminate the discrimination.

Certiorari should be granted on this ground to resolve the conflict between the Opinion of the Court of Appeals below and the standing decisions of the Courts of Appeals in other Circuits, to define the scope of the ADEA prohibitions against age discrimination regarding positions available after termination of an older employee, especially positions within the knowledge or reasonable expectation

of the employer at the time of termination, and to review the statutory mandate of jury trial under ADEA with regard to such subsequent available positions.

CONCLUSION

For the foregoing reasons, Legner respectfully submits that the petition for certiorari should be granted.

Dated:

Respectfully submitted,

FREDERICK C. ROESTI
COUNSEL OF RECORD
Attorney for Petitioner
William J. Legner

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 81-4003
D.C. No. C 78-1192 AJZ

William Joseph Legner,
Plaintiff-Appellant,

vs.

Union Pacific Railroad Company,
Defendant-Appellee.

[Filed May 26, 1982]

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Honorable Alfonso J. Zirpoli,
Senior United States District Judge, Presiding

Argued and Submitted: February 12, 1982

Before: MERRILL, KENNEDY, and CANBY, Circuit Judges.

William T. Legner, fifty-four years old at the time of his discharge, filed an action against Union Pacific Railroad Co. (the Railroad) under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976). The district court granted the Railroad's motion for directed verdict, and Legner appeals from the judgment entered against him. After a review of the trial record, we conclude the district court did not err and affirm.

Legner concedes his position as Assistant Chief Clerk to Traffic Manager was abolished for legitimate business reasons. The Railroad offered to transfer Legner to a clerk/stenographer position in Oakland and claims it did so because the job was the best one for which Legner was qualified and for which there was an opening. Legner, informed that other jobs might open in the future, but apparently unwilling to take the clerk/stenographer position even temporarily, refused the transfer and was terminated on or about July 1, 1976.

Legner contends that in determining whether or not a prima facie case was established, this court must analyze the positions which opened after he left the Railroad. In the circumstances of this case, if the clerk/stenographer position was the only available job to which Legner merited a transfer during the period before his refusal to take it and his termination, then it would be inappropriate for this court to consider positions opening later. For purposes of contesting the directed verdict, then, the case stands or falls on his claim that the evidence can support a finding that he was unlawfully refused a position available before July 1, 1976.

Legner argues that the Railroad did illegally reject him for alternative positions available before July 1, 1976, when it: (1) allowed one Borrowman to take over some of Legner's former duties for several weeks pending the complete abolition of those tasks; (2) refused to promote Legner to a position as Traffic Agent; and (3) failed to elevate Legner to the management training program. Legner may establish that these latter two actions by the Railroad supported a prima facie case of age discrimination by showing: (i) he belonged to the protected class; (ii) he

applied and was qualified for an available position; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the Railroad continued to seek applicants from persons of his qualifications. *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978). Similarly, he may establish a prima facie case based on the use of the alleged substitute if he shows: (i) he was a member of the protected class; (ii) he was performing his job in a satisfactory manner; (iii) he was discharged; and (iv) the substitute was in fact a replacement who was a substantially younger employee with equal or inferior qualifications. *Douglas*, 656 F.2d at 532-33. These standards are flexible and can be modified to accommodate the particular case. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979).

If a plaintiff establishes a prima facie case, the defendant must offer evidence of a legitimate, nondiscriminatory reason for rejecting plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To sustain a directed verdict against the prima facie case, the defendant "must establish that a jury could not reasonably find that age discrimination was a determining factor" in its actions. *Douglas*, 656 F.2d at 533. When the evidence of a legitimate, nondiscriminatory reason is sufficiently clear to undermine any permissible inference of discrimination, the plaintiff must offer some credible evidence that the defendant's nondiscriminatory reason was a mere pretext for age discrimination. *See id.* at 534-35.

Applying these standards to the instant case, we conclude the district court correctly granted the Railroad's motion for a directed verdict. Legner failed to introduce

any direct evidence of age discrimination. The Railroad's use of Borrowman to perform some of Legner's tasks for several weeks during the phase out period cannot even be categorized as a replacement of Legner, much less a discriminatory replacement. Legner was not promoted to the management training program or the Traffic Agent position because he was unqualified. The uncontested evidence introduced by Legner was that those promotions only went to employees rated "1" or "2," and Legner had an overall rating of "3." Though one of Legner's evaluations indicated he was ready for promotion to Traffic Agent, though one management employee from the Railroad stated that Legner was qualified given *no other people* he might promote, and though Legner did introduce some statistical data, these were at most sufficient merely to establish a prima facie case, and we cannot state they were adequate even for that. Nevertheless, assuming this showing had been enough to maintain a prima facie case, the uncontradicted and overwhelming evidence that the Railroad had a legitimate, nondiscriminatory motive prevented a jury from finding that age discrimination was a determining factor in the Railroad's actions. Because Legner did not offer credible and sufficient evidence that the Railroad's nondiscriminatory reason was a mere pretext for age discrimination, a directed verdict on the issue was appropriate. Legner's other contentions are equally without merit, and we therefore affirm.

AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 81-4003

William Joseph Legner,
Plaintiff-Appellant,

vs.

Union Pacific Railroad Company,
Defendant-Appellee.

[Filed Aug. 31, 1982]

ORDER

Before: MERRILL, KENNEDY, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Canby have voted to reject the suggestion for a rehearing en banc, and Judge Merrill has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appendix C

United States District Court
For the Northern District of California

No. C 78 1192 AJZ

William Joseph Legner,
Plaintiff,

vs.

Union Pacific Railroad Company,
Defendant.

[Filed Oct. 16, 1980]

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered in this action,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Union Pacific Railroad Company take judgment, that plaintiff William J. Legner take nothing by his complaint, and that the parties shall bear their own costs.

Dated: October 16, 1980

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix D

United States District Court
For the Northern District of California

No. C 78 1192 AJZ

William Joseph Legner,
Plaintiff,

vs.

Union Pacific Railroad Company,
Defendant.

[Filed Oct. 16, 1980]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before a jury on February 4, 1980. Following presentation of evidence on February 4 and February 5, 1980, plaintiff rested. Defendant moved for a directed verdict pursuant to Rule 50(a), Fed.R.Civ.P., the motion was argued before the court by counsel for the parties, and the court ruled in favor of defendant on February 5, 1980.

The court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff William J. Legner was at the time of his termination of employment with defendant Union Pacific Railroad fifty-four years of age.

2. Defendant Union Pacific Railroad is and at all relevant times was a corporation engaged in the business of interstate railroad carriage, with headquarters in Omaha, Nebraska, and offices throughout the United States.

3. The abolition of plaintiff's position as Assistant Chief Clerk to Traffic Manager was for sound business reasons.

4. The evidence presented is not susceptible to a reasonable inference that there was at the time of the termination of plaintiff's employment any position, including those of Chief Clerk to Traffic Manager, Chief Clerk to Traffic Agent in the Reno office, which were both available and for which plaintiff was qualified.

5. The evidence presented is not susceptible to a reasonable inference that age played any determining factor in the employment decisions of defendant with respect to plaintiff.

6. Plaintiff was offered reasonable comparable alternative employment by defendant, and rejected it.

7. The evidence presented points so strongly in defendant's favor that reasonable jurors could not arrive at a verdict other than for defendant.

CONCLUSIONS OF LAW

1. This court has jurisdiction over plaintiff's allegations of age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. sections 621 *et seq.*, pursuant to the provisions of 29 U.S.C. section 633a(c), 28 U.S.C. section 1331, 28 U.S.C. section 1337, and 28 U.S.C. section 1343.

2. On motion for directed verdict in favor of defendant, the evidence and inferences therefrom must be viewed in a light most favorable to plaintiff and against defendant.

3. Viewing the evidence in that light, the court concludes that the evidence adduced by plaintiff failed to es-

tablish a prima facie case of age discrimination, *Connelly v. Joseph Schlitz Brewing Co.*, 600 F.2d 461 (5th Cir. 1979).

4. Viewing the evidence in that light, the court concludes that the evidence adduced by plaintiff affirmatively rebuts the contention that defendant engaged in any discrimination against plaintiff on account of his age.

Accordingly, defendant's motion for directed verdict is hereby granted.

Dated: October 16, 1980

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix E

United States District Court
For the Northern District of California

No. C 78-1192 AJZ

William Joseph Legner,
Plaintiff,

vs.

Union Pacific Railroad Company,
Defendant.

[Filed Dec. 3, 1980]

ORDER DENYING MOTIONS FOR NEW TRIAL AND TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's motions for a new trial and to amend findings of fact and conclusions of law came on regularly for hearing on November 24, 1980, at 1:30 p.m. The court, having heard oral argument and considered the papers submitted by both parties, makes the following order:

1. In granting defendant's motion for directed verdict, the court applied the proper standard of proof and viewed the evidence in the light most favorable to plaintiff. Plaintiff's motion for a new trial is therefore denied.

2. The findings of fact and conclusions of law entered in this case adequately set forth the bases for the court's decision. Plaintiff's motion to amend the findings of fact and conclusions of law is therefore denied.

SO ORDERED.

Dated: December 3, 1980

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix F

Tuesday, February 5, 1980

ORAL RULING

The Court: Well, what is disturbing to me is that I still don't see the evidence which would support a finding that there was an available position for which the plaintiff was qualified at the time of the termination. That is the thing that disturbs me.

If I am satisfied that the evidence won't support a finding of that nature, then I would have no alternative—

Mr. Allen: Again, it leaves to the control—

The Court: Then there is the further evidence that the plaintiff was offered what I would consider reasonably similar employment, which he declined. I don't think the evidence will support a finding that there was an available promotion, and further evidence is demonstrated by exhibit No. 2 as to the offer of a reasonably similar employment. True, it meant a transfer to a union position, but, nevertheless, it was an adequate effort on the part of the defendant.

Accordingly, I would say that the facts of this case and the inferences to be drawn therefrom point so strongly and so overwhelmingly in favor of the defendant that the court believes that reasonable men could not arrive at a contrary verdict. The evidence is not susceptible of a reasonable inference that age played a part in the decisions regarding the plaintiff, and, accordingly, I am going to direct a verdict in favor of the defendant.

Mr. Allen: Your honor, could you reserve your ruling until tomorrow?

The Court: No, I have made my ruling. I will just inform the jury of it tomorrow. That is all.

Mr. Whitcomb: Would you like counsel to be present in the morning?

The Court: Absolutely. The jury is going to be here. I will advise them of what I have done.

You can prepare a judgment accordingly.

Mr. Whitcomb: Yes, your honor.

(Proceedings adjourned for the day.)

Appendix G

Wednesday, February 6, 1980: 10:00 AM

PROCEEDINGS:

The Court: The jurors are all present.

Ladies and gentlemen of the jury, after yesterday's recess, the attorney for the defendant made a motion for a directed verdict in favor of his client.

After hearing arguments, the court granted that motion, thereby ending the case in favor of the defendant.

The court did so because there can be no doubt that the termination of plaintiff's employment was for sound business reasons, and was in no way related to plaintiff's age. Additionally, the evidence disclosed that the plaintiff was offerred reasonably comparable alternative employment, which he rejected.

Since the evidence will not support a finding that there was at the time of termination of his employment an available position for which he was qualified, and to which he could be promoted, the court is without evidence susceptible to a reasonable inference that age was a determining factor or played any significant part in the decisions regarding the plaintiff.

In short, the facts of this case and the inferences to be drawn therefrom point so strongly in favor of the defendant, that the court believes that reasonable jurors could not arrive at a contrary verdict.

And hence, as I indictated, I granted the motion for a directed verdict, which ends the need for your services here. I want to thank you. It is essential that we have the jurors because, at least until the plaintiff's case is in, we

have no way of evaluating the need and degree to which the services of the jury will be further required.

I want to thank you for the services you have rendered in this case, and you are now excused until further notice.

All right, gentlemen, we will be in recess.

(Proceedings adjourned.)

Appendix H

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Dec. 15, 1967, P. L. 90-202, § 2, 81 Stat. 602.)

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act (Pub. L. 90-202, § 4, 7, Dec. 15, 1967, 81 Stat. 603; as amended Pub. L. 95-256 § 2 (a), Apr. 6, 1978, 92 Stat. 189.)

§ 626. Recordkeeping, investigation and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial. (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

• • •

(Pub. L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; as amended Pub. L. 95-256, § 4 (a), (b)(1), (c)(1), April 6, 1978, 92 Stat. 190, 191.)

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

• • •

(Pub. L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; as amended Pub. L. 95-256, § 3(a), Apr. 6, 1978, 92 Stat. 189.)

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-872
IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM JOSEPH LEGNER,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MICHAEL L. WHITCOMB,
5480 Ferguson Drive,
P.O. Box 22004,
Los Angeles, Calif. 90022,
(213) 725-2494,
Attorney for Respondent Union Pacific Railroad Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented

1. Must a plaintiff in an Age Discrimination in Employment Act case offer credible and sufficient evidence that an employer's legitimate, non-discriminatory motive was a mere pretext for age discrimination in order to avoid a directed verdict after presentation of plaintiff's case?

2. When an employee's position is being abolished for a legitimate, non-discriminatory business purpose and the employee refuses the only other available job opening within his qualifications, must a court take into consideration positions opening after the employee's refusal and termination in ruling on a motion for directed verdict after plaintiff's case in chief?

TABLE OF CONTENTS

Page

Questions Presented i

Statement of Case 2

Argument 6

I.

The Court Below Used the Appropriate Standard of Review and Correctly Applied That Standard in Approving the Motion for Directed Verdict 6

II.

When Ruling on a Motion for Directed Verdict in an Age Discrimination Case for Failure to Promote, a Court Should Not Consider Alternate Positions Which Became Available After the Employee Was No Longer Employed and for Which He Made No Reemployment Application 11

Conclusion 15

TABLE OF AUTHORITIES

Cases	Page
Bertrand v. Orkin Exterminating Co., 454 F.Supp. 78 (N.D.Ill. 1978)	14
Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)	10
Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (5th Cir. 1980)	14
Coates v. National Cash Register, 433 F.Supp. 655 (W.D.Vir. 1977)	14, 15
Cova v. Coca-Cola Bottling Co. of St. Louis, 574 F.2d 958 (1978)	7
Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981)	7, 8
East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1979)	13
Furnco Construction Co. v. Waters, 438 U.S. 567 (1978)	6
Haring v. CPC Int'l, Inc., 664 F.2d 1234 (5th Cir. 1981)	8
Hedrick v. Hercules, Inc., 658 F.2d 1088 (1981)	10
Jacobs v. Martin Sweet Co., Inc., 550 F.2d 364 (6th Cir. 1978)	14
Laugesen v. Anaconda Corp., 510 F.2d 307 (1975)	7
Loeb v. Textron, Inc., 600 F.2d 1003 (1979)	7, 8, 9, 11
Lorillard v. Pons, 434 U.S. 575 (1978)	8
Marshall v. Airpax Electronics, Inc., 595 F.2d 1043 (5th Cir. 1979)	11, 12, 13, 15
McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980)	11, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	6, 11, 13, 14

Page

McLean v. Phillips-Ramsey, Inc., 624 F.2d 70 (9th Cir. 1980) 13

Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981) 7

Rosada v. Santiago, 562 F.2d 114 (1st Cir. 1979) 14

Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981) 8

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 8

Wilson v. Sealtest Foods Division of Kraftco Corp., 501 F.2d 84 (1974) 7

Statutes

United States Code, Title 29, Sec. 621 et seq. 2, 6

United States Code, Title 29, Sec. 621(b) 6

United States Code, Title 29, Sec. 626(c)(2) 8

No. 82-872

IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM JOSEPH LEGNER,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent Union Pacific Railroad Company[1] opposes the granting of the Petition for Writ of Certiorari in this case.

---

[1] Respondent Union Pacific Railroad Company is a wholly-owned subsidiary of Pacific Rail System, Inc., which is a wholly-owned subsidiary of Union Pacific Corporation. Respondent has a number of subsidiaries and affiliates which are wholly owned. The only subsidiaries and affiliates which are owned in part by others are: Alameda Belt Line; Alton & Southern Railway Company; Brownsville & Matamoros Bridge Co.; Camas Prairie Railroad Company; Galveston, Houston and Henderson Railroad Co.; Houston Belt & Terminal Railway Co.; Jefferson Southwestern Railroad Co.; Missouri Pacific Corporation; Oakland Terminal Railway; Portland Traction Company; Southern Illinois and Missouri Bridge Co.; St. Joseph Terminal Railway Company; The Ogden Union Railway & Depot Company; The Weatherford Mineral Wells and Northwestern; The Western Pacific Railroad Company; UINTA Development Corporation; Union Pacific Resources Ltd.; and The Saint Joseph & Grand Island Railway Company.

STATEMENT OF CASE.

Petitioner filed this case in the United States District Court for the Northern District of California alleging that Respondent Union Pacific Railroad Company (Union Pacific) had violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq*. The Honorable Alfonso J. Zirpoli presided over the jury trial which began in San Francisco on February 4, 1980. At the conclusion of Petitioner's case, Union Pacific moved for a directed verdict on the basis of the evidence presented, trial briefs and oral argument. The motion was granted. The District Court's Findings of Fact and Conclusions of Law are attached as Appendix B to the Petition for Writ of Certiorari.

The evidence at trial revealed that Petitioner was a non-union employee of Union Pacific Railroad Company for approximately 19 years. He held several clerical positions with the title of clerk or clerk/stenographer while performing the duties of stenographer, accounting clerk and statistical clerk. Petitioner then became a ticket agent responsible for planning tours for passengers. Subsequent promotion to Assistant City Ticket Agent and City Ticket Agent included responsibilities for preparing passenger and freight accounting information and supervising employees doing the same type of work.

Passenger service by Union Pacific was abolished in 1970. After the concomitant abolishment of Petitioner's job as City Ticket Agent, he continued to perform freight accounting functions for the Traffic Department. His title was changed to Assistant Chief Clerk to Traffic Manager. This did not represent a promotion. Petitioner continued to perform clerical accounting functions and did not act as an assistant to the Chief Clerk. Petitioner's salary was less than that of four union clerical jobs in the office. Petitioner held

the position of Assistant Chief Clerk to Traffic Manager from January 1, 1971 through June 30, 1976.

A clerk/stenographer, Brent Borrowman, who had been employed at Union Pacific since 1968 was assigned to assist in performing the freight accounting functions for Northern California in 1973. Mr. Borrowman testified that in 1976 he was spending approximately half of his time performing freight accounting functions and the remainder of his time doing other reports and clerical tasks in the Traffic Manager's office. Although Mr. Borrowman was assisting in the performance of freight accounting work, Petitioner had no authority or control over Mr. Borrowman's employment. In fact, Mr. Borrowman was a union employee whose salary exceeded that of Petitioner.

Petitioner did not claim that Union Pacific discriminated against him in any way from the time of his initial employment in 1957 until 1976. Petitioner admitted that the accounting functions which he was performing were transferred to Los Angeles for a valid business reason and he did not claim that this decision was in any way made to get rid of him.

The transfer of the accounting functions to Los Angeles began during the first week of July, 1976 and was completed as of July 23, 1976. Petitioner took four weeks of vacation in June, 1976. During that period of time, and while the accounting functions were being transferred to Los Angeles during the first three weeks of July, Mr. Borrowman performed the freight accounting functions necessary in addition to his other office duties. As a partial result of the decision to transfer the freight accounting functions to Los Angeles Mr. Borrowman's union position was also abolished and he was assigned to another clerk/stenographer position effective August 1, 1976.

Petitioner was first advised in April, 1976 that the accounting functions would be transferred to Los Angeles and his job would be abolished. Alternative job opportunities in union clerical jobs in the Bay area were discussed with him. Basically he was given his choice of those jobs but did not want to displace anyone. No other non-union clerical jobs were available in the Northern California area from April to June, 1976. Petitioner's supervisor was not aware of another available non-union clerical job in Northern California until July 23 or 24, 1976 after Petitioner was no longer employed by the company.

At Union Pacific, non-union employees are rated on an evaluation Form 2900 as either 1-outstanding; 2-superior; 3-fully competent; 4-generally adequate; or 5-marginal or no rating. Within the Traffic Department promotions are given to No. 1 or No. 2 rated people. Petitioner's overall performance appraisal rating was 3-fully competent.

While Petitioner was on vacation in June, 1976 he received a letter officially notifying him that his position as Assistant Chief Clerk to Traffic Manager was being abolished June 30, 1976 and was offered the available position as clerk/stenographer in Oakland. Petitioner had previously expressed a desire to remain in the Bay area. Petitioner did not respond to the letter. In response to a telephone call on July 1 from his superior, Petitioner advised that he was not interested in the Oakland job. Because Petitioner's job was being abolished and because of his refusal to accept the only other available non-union clerical job, he was terminated effective July 1, 1976. Petitioner did not protest the termination of his employment orally or in writing.

At trial Petitioner admitted that the decision to install a lock-box system and to abolish his job in San Francisco was made for a valid business reason and was not the result of any discriminatory motive. Petitioner's only claim of age

discrimination was in regard to personnel decisions made by Union Pacific Traffic Department management after the abolishment of Petitioner's position was known. At the time of trial Petitioner agreed that he had no direct evidence of any discriminatory action in violation of the Age Discrimination in Employment Act.

In ruling on the Motion for Directed Verdict the District Court found that the indirect and circumstantial evidence presented was not susceptible to a reasonable inference that there was at the time of Petitioner's termination any position which was available and for which Petitioner was qualified. The District Court further found that the evidence presented was not susceptible to a reasonable inference that age played any determining factor in the employment decisions of the Union Pacific with regard to Petitioner. (Appendix D to Petition, p. A-8, paragraphs 4 & 5).

In subsequently ruling on a Motion for New Trial and to Amend Findings of Fact and Conclusions of Law, the District Court reviewed its decision and found that it had applied the proper standard of proof and had viewed the evidence in the light most favorable to Petitioner. (Appendix E to Petition, p. A-10) The motions were denied and the case was taken on appeal by Petitioner to the Ninth Circuit Court of Appeals. There, after full briefing and oral arguments, the Ninth Circuit Court of Appeals affirmed the trial court's decision and subsequently denied a Petition for Rehearing. (Appendices A & B to Petition, pp. A1-A5).

ARGUMENT.

I.

The Court Below Used the Appropriate Standard of Review and Correctly Applied That Standard in Approving the Motion for Directed Verdict.

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* was enacted in 1967 for the express purpose of promoting "employment of older persons based on their ability rather than age" and prohibiting "arbitrary age discrimination". 29 U.S.C. §621(b). The Act was never intended to be a panacea for all older workers terminated or not offered employment by an employer.

Petitioner seeks a writ of certiorari on the grounds that the Ninth Circuit Court of Appeals decision in this case is in conflict with the rulings of other circuit courts of appeal. Since Petitioner conceded that his position as Assistant Chief Clerk to Traffic Manager was abolished for legitimate business reasons and further conceded that he had no direct evidence of any age discrimination, the Ninth Circuit Court of Appeals accurately analyzed the evidence presented by Petitioner under the formula established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court has indicated that the *McDonnell Douglas* formula is flexible and can be modified to accommodate the particular case. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).

In affirming the District Court's directed verdict, the Ninth Circuit carefully delineated the elements of the formula it was using to analyze Petitioner's case.

> "Legner argues that the Railroad did illegally reject him for alternate positions available before July 1, 1976, when it: (1) allowed one Borrowman to take over some of Legner's former duties for several weeks

pending the complete abolition of those tasks; (2) refused to promote Legner to a position as Traffic Agent; and (3) failed to elevate Legner to the management training program. Legner may establish that these latter two actions by the Railroad supported a prima facie case of age discrimination by showing: (i) he belonged to the protected class; (ii) he applied and was qualified for an available position; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the Railroad continued to seek applicants from persons of his qualifications. *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978). Similarly, he may establish a prima facie case based on the use of the alleged substitute if he shows: (i) he was a member of the protected class; (ii) he was performing his job in a satisfactory manner; (iii) he was discharged; and (iv) the substitute was in fact a replacement who was a substantially younger employee with equal or inferior qualifications. *Douglas*, 656 F.2d 532-33. These standards are flexible and can be modified to accommodate the particular case. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979)." (Appendix A to Petition, pp. A-2 & A-3).

The formula used in this case was in substantial conformity with other Ninth Circuit decisions. *See, Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981) and *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981). This formula has also been similarly used in Age Discrimination in Employment Act cases by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979), the Sixth Circuit in *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (1975), the Eighth Circuit in *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958 (1978), and the Fifth Circuit in *Wilson v. Sealtest Foods Division of Kraftco. Corp.*, 501 F.2d 84 (1974).

Petitioner seems to argue that the right to jury trial in an age discrimination case, which is granted by 29 U.S.C. §626(c)(2) and was recognized in *Lorillard v. Pons*, 434 U.S. 575 (1978), eliminates the possibility of the trial court granting a directed verdict after the plaintiff's case in chief. However, contrary to Petitioner's argument, the circuit courts have uniformly agreed that a plaintiff must do two things before requiring the employer to present any evidence in response, (1) present a prima facie case of age discrimination and, (2) present evidence that any explanation proffered by Defendant is a mere pretext. *E.g., Loeb v. Textron Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1237 (5th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 412 (9th Cir 1981). These requirements conform to this Court's opinion in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). These elements were specifically required by the Ninth Circuit Court of Appeals in this case and found to be lacking.

> ". . . these (facts) were at most sufficient merely to establish a prima facie case, and we cannot state they were adequate even for that. Nevertheless, assuming this showing had been enough to maintain a prima facie case, the uncontradicted and overwhelming evidence that the railroad had a legitimate, non-discriminatory motive prevented a jury from finding that age discrimination was the determining factor in the railroad's action." (Court of Appeals Opinion, Appendix A to Petition, p. A-4).

This finding coincides with the Ninth Circuit's decision in *Douglas v. Anderson*, 656 F.2d 528 (1981) in which it found that the evidence that Plaintiff was discharged for a legitimate, non-discriminatory reason was overwhelming and completely undermined any inference of discrimination that

may have been raised through Plaintiff's circumstantial evidence. Further in that case, as in this, the Plaintiff did not produce substantial evidence in support of the claim that the former employer's action was merely a pretext for age discrimination.

The right to a jury trial in age discrimination cases does not eliminate the possibility of a motion for a directed verdict by the defendant at the conclusion of a plaintiff's case. There is no conflict among the Circuit Courts on this issue. The First Circuit specifically acknowledged the Plaintiff's responsibilities to present evidence to prove each element of the prima facie case and that Defendant's reason was a pretext in the case of *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1979).

> "Nor does use of *McDonnell Douglas*, as we understand it, pose any real, as opposed to theoretical, difficulty for disposing of motions for directed verdicts in jury trials. Normally the plaintiff will know ahead of trial what reason the defendant is relying on, and the usual order of trial, with plaintiff putting all of his evidence in first, will suffice. If defendant then moves for a directed verdict, the judge will be able to determine whether enough evidence has been introduced to allow the jury to find each disputed element of the prima facie case and that defendant's reason is a pretext. As the defendant's burden is not one of persuasion, *McDonnell Douglas* creates no impediment to ruling on this motion before the defendant has put on his defense."

The standard applied by the Ninth Circuit in this case is the same as that used by the First Circuit.

Petitioner argues that the Ninth Circuit's ruling is in conflict with the standards applied by the Fifth Circuit on motions for directed verdict. Discussing motions for directed

verdict in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) the Fifth Circuit stated:

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury." 411 F.2d at 374.

This standard of review was cited, approved and applied by the Fifth Circuit in the age discrimination case of *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (1981). There is no conflict in the standards used by the Fifth Circuit, the Ninth Circuit or any other circuit court of appeals in ruling on motions for directed verdicts in ADEA cases. Any difference in circuit court decision results, as it should, from applying the same standard to the different facts of the cases.

In this case Petitioner admitted that there was no direct evidence of age discrimination and that the abolishment of Petitioner's position with the railroad was for a legitimate, valid business reason. The only issue is whether there was enough circumstantial evidence presented by Petitioner at trial to make a prima facie showing of age discrimination and to show that Defendant's explanation of its actions was a mere pretext. Petitioner is really not seeking a clarification of conflicting standards among circuit courts but is asking for another attempt to argue that the Petitioner's case presented some evidence of age discrimination. Both the District Court and the Ninth Circuit Court of Appeals upon

reviewing the evidence found that Petitioner had not met that burden. There is no necessity for this Court to again review the factual evidence to confirm that finding.

II.

When Ruling on a Motion for Directed Verdict in an Age Discrimination Case for Failure to Promote, a Court Should Not Consider Alternate Positions Which Became Available After the Employee Was No Longer Employed and for Which He Made No Reemployment Application.

Petitioner argues that the Ninth Circuit's opinion excluding consideration of potential jobs for Petitioner which were not available at the time he refused to accept the new position offered him is in conflict with the decisions of other circuits. In support of this contention Petitioner cites three age discrimination cases: *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980); and *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043 (5th Cir. 1979). None of these cases evidences any contradiction among circuit courts which necessitates this Court's consideration.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the Court did discuss as a part of the facts the hiring of a person younger than the plaintiff five months after the plaintiff was terminated. But the issue in the case was whether the evidence supported the third requirement for a prima facie case under the *McDonnell Douglas* formula, *i.e.*, whether Plaintiff was replaced by a younger person. These facts were important because the plaintiff alleged that the same job, with a different title, was given to a younger employee after Plaintiff's termination. The evidence presented supported Plaintiff's prima facie case under the formula. There was no evidence or issue as to the availability

of positions for Plaintiff after termination. There is no conflict between the First Circuit's decision in *Loeb* and the Ninth Circuit opinion in this case.

Petitioner contends that the Fifth Circuit's decision in *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), is also in conflict with the Ninth Circuit opinion below. Petitioner notes that in *McCorstin*, the Court examined post-termination conduct by the employer to determine whether the employer's proffered explanation was pretext. But such a consideration is not in conflict with the Ninth Circuit's opinion in this case. In *McCorstin*, the only evidence of subsequent personnel actions was regarding the solicitation and hiring of college graduates to work in various engineering departments. McCorstin did not offer this evidence to prove that he should have been offered one of those jobs, but to show a general pattern of age discrimination. The case did not deal with any specific position which became available after Plaintiff's termination. There is no conflict in this holding when compared with the decision of the Court of Appeals below.

In the case of *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043 (5th Cir. 1979), three women aged 45, 32, and 47 applied for an executive secretary position. They were interviewed in that order and the job was offered to the 32-year-old before the 47-year-old was interviewed. Direct evidence was presented that showed the employer was discriminating on the basis of age. The 45-year-old was given an award of back pay. However, the 47-year-old's claim was denied and the denial affirmed by the Fifth Circuit because there was no job opening at the time she was interviewed. The position had already been given to the 32-year-old.

> ". . . it clearly appears that there was no job opening at the time of the interview and, of course, the position

> did not remain open because it had been previously filled.
>
> * * *
>
> The contention of the Government that this Court should order relief for Ms. Neshick even if no vacancy existed at the precise moment of application is erroneous." 595 F.2d at 1044.

The facts in the *Airpax* case are distinguishable from Petitioner's action. Significantly, in *Airpax* there was direct evidence of age discrimination. Also, *Airpax* was a failure to hire case, so a plaintiff could show that she should have been considered for subsequent openings for other positions. But the holding in *Airpax* directly supports the Ninth Circuit Court of Appeals decision below. If there was no position available at the time the discrimination is alleged to have taken place then a prima facie case under the ADEA, using the *McDonnell Douglas* formula, has not been presented.

As additional authority for his claim of conflicting circuit opinions, Petitioner cites the Title VII cases of *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1979) and *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70 (9th Cir. 1980). As Petitioner explains, in both of those cases the Court considered employment opportunities for a period of time after application for employment had been made. But the significant distinguishing factor in those cases is that they dealt with failure to hire claims. There is no evidence that Petitioner in this case reapplied for any position that subsequently became available at Union Pacific after he refused to accept the only available, reasonably comparable position at the time.

Failure to hire cases are markedly different from Petitioner's claim in this case. When a person files an application for employment it is expected that the person will be considered for positions available at the time of appli-

cation and for positions of similar qualifications for which the employer seeks personnel within a reasonable period after that time. The *McDonnell Douglas* formula encompasses that expectation. But Petitioner was not considered for subsequent positions because he was no longer an employee and had not made application or any other attempts to be reemployed by Union Pacific. In fact, he had expressed no interest whatsoever in other positions after he refused the clerk/stenographer job. He made no protest orally or in writing regarding his termination. Therefore, the only rational approach to Petitioner's claim was not to consider positions which became available after Petitioner was no longer employed. The Ninth Circuit was certainly justified in adopting this approach. Because of the factual differences, the ruling of the Court below in no way contradicts other circuit court decisions.

Petitioner argues that the purposes of the ADEA will not be met and that a jury as trier of fact will be deprived of relevant evidence in determining age discrimination by application of the approach used by the Court of Appeals below. But that decision does not render a ruling on the admissibility of evidence of an employer's conduct on the issue of pretext. All it does is require that a plaintiff prove a prima facie case of discrimination on the basis of age as to some position or employment benefit available at the time when the discrimination is alleged to have taken place. Such a holding is necessary and proper and does not conflict with other decisions.

Petitioner cites the cases of *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980); *Jacobs v. Martin Sweet Co., Inc.*, 550 F.2d 364 (6th Cir. 1978); *Rosada v. Santiago*, 562 F.2d 114 (1st Cir. 1979); *Bertrand v. Orkin Exterminating Co.*, 454 F.Supp. 78 (N.D.Ill. 1978); and *Coates v. National Cash Register*, 433 F.Supp.

655 (W.D.Vir. 1977) as being in conflict with the Court of Appeals decision below. However, review of those cases shows dissimilar facts and none of those cases contains legal holdings which conflict with the rulings in this case. Petitioner has not shown any direct conflict between the opinions below and other decisions of circuit courts. If anything, the cases dealing with ADEA actions, such as *Marshall v. Airpax*, support the rulings in this case. There is no reason for this Court to review this case.

CONCLUSION.

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Dated: January 10, 1983.

Respectfully submitted,

MICHAEL L. WHITCOMB,

Attorney for Respondent Union Pacific Railroad Company.